

US EPA ARCHIVE DOCUMENT

IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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NO. 11-15454-HH

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ELIZABETH E. SAWYER

Plaintiff-Appellant,

v.

LISA JACKSON, Administrator of the  
U.S. Environmental Protection Agency,

Defendant-Appellee.

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On Appeal From The United States District Court  
For The Northern District of Georgia

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BRIEF FOR APPELLEE

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UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

ELIZABETH E. SAWYER :  
 :  
 Appellant, :  
 :  
 v. : APPEAL NO. 11-15454-HH  
 :  
 LISA JACKSON, Administrator :  
 of the U.S. Environmental :  
 Protection Agency, :  
 :  
 Appellee. :

**CERTIFICATE OF INTERESTED PERSONS**

**AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to 11th Cir. R. 26.1-2(a), appellee Lisa Jackson submits that the following persons and/or entities are known to have an interest in the outcome of this appeal:

Ben-David, Neeli, Assistant United States Attorney

Brill, Gerrilyn G., United States Magistrate Judge

Jackson, Lisa, Appellee, Administrator of the U.S. EPA

Kumar, Narindar, Defendant (dismissed in district court)

Lapierre, Kenneth, Defendant (dismissed in district court)

McCurry, Douglass, Defendant (dismissed in district court)

Miller, Jamie G., Attorney for Appellant

Ward, Horace T., Senior Judge, United States District Court

Yates, Sally Quillian, United States Attorney

**STATEMENT REGARDING ORAL ARGUMENT**

Appellee respectfully submits that oral argument is not necessary in this case. The issues and positions of the parties, as presented in the record and briefs, are sufficient to enable the Court to reach a just determination.

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**STATEMENT OF JURISDICTION**

The district court had jurisdiction over plaintiff's claims of discrimination and retaliation pursuant to Title VII of the Civil Rights Acts of 1964, as amended, 42 U.S.C. § 2000e-16 and the Age Discrimination in Employment Act, 29 U.S.C. 633a. This Court has jurisdiction over this timely appeal from the order and judgment of the district court entered on September 22, 2011 pursuant to 28 U.S.C. § 1291.

**STATEMENT OF THE ISSUES**

- I. Whether the District Court Properly Dismissed Ms. Sawyer's Failure To Promote Claim Because:
- A. Ms. Sawyer Failed To Establish A Prima Facie Failure To Promote Claim Because She Failed To Show That She Was Treated Less Favorably Than A Similarly Situated Co-Worker Outside Of Her Protected Class Or That She Was Qualified For The Promotion; and
  - B. Ms. Sawyer Failed To Show That The Reason Her Position Was Not Upgraded To A GS-13 level Or That Mr. McCurry's Basis For Selecting Mr. Stewart, Four Years Later, For A GS-14 Position Was A Pretext For Discrimination?
- II. Whether the District Court Properly Dismissed Ms. Sawyer's Retaliation Claims Because:
- A. Ms. Sawyer Failed To Show That She Was Denied A Promotion Because She Engaged In Protected Activity Or That The Reason For The Failure To

Promote Was A Pretext For  
Retaliation;

B. Ms. Sawyer Failed To Establish A  
Title VII Claim Based On Her  
Suspension Because She Implicitly  
Admits That There Is No Causal Link  
Between Her EEO Activity And The  
Suspension; and

C. Ms. Sawyer's Required Participation  
In The South Carolina Pilot Project  
Was Not A "Materially Adverse"  
Action And Was Not Motivated By  
Retaliatory Intent?

III. Whether The District Court Properly Held That  
Ms. Sawyer's Allegations Failed To State An  
Actionable Constructive Discharge Claim?

**STATEMENT OF THE CASE**

**1. Course of Proceedings and Disposition Below**

On September 25, 2008, appellant Elizabeth Sawyer filed a federal court complaint in which she asserted claims under Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), 23 U.S.C. § 2302 [sic], and 42 U.S.C. §§ 1981 and 1983. See Doc. 1 (Complaint) at 1. Before she served the defendants with the complaint, Ms. Sawyer filed an amended complaint and a second complaint. See Docs. 2, 6. The amended complaint corrected her mis-identification of the Whistleblower Protection Act (the "WPA"), which can be found at 5 U.S.C. § 2302, and re-asserted her claims under Title VII, the ADEA and sections 1981 and 1983. See Doc. 2 (First Amended Complaint) at 1. The second amended complaint substituted the name of the current Administrator of Environmental Protection Agency (the "EPA"). All four of the complaints named as defendants the EPA Administrator, the EPA, and the following EPA employees in their individual and official capacities: Kenneth LaPierre, Narindar Kumar and Douglas McCurry. See Docs 1, 2, 6.

In addition, Ms. Sawyer sought a series of extensions of time to serve her latest complaint on the defendants. See Docs. 3, 8, 9. After Ms. Sawyer finally served the Second Amended

Complaint, the defendants moved to dismiss her WPA claim, her § 1981 and § 1983 claims, her punitive damages claim and all claims asserted against the EPA, Mr. LaPierre, Mr. Kumar and Mr. McCurry. See Doc. 12 (Defendants' Motion to Dismiss). Ms. Sawyer, in her response brief, acknowledged that her § 1981, § 1983 and punitive damages claims, as well as her claims against the EPA, Mr. LaPierre, Mr. Kumar and Mr. McCurry, were improper and should be dismissed; however, she claimed that the WPA claim was properly asserted. See Doc. 15 (Plaintiff's Response to Defendants' Motion to Dismiss).

The Magistrate Judge issued a December 15, 2009 Non-Final Report and Recommendation (the "December 2009 R&R") and concluded that Ms. Sawyer failed to exhaust in good faith when she refused to respond to the agency's repeated requests for information relevant to her WPA claim. See Doc. 26 at 7-8. Accordingly, the December 2009 R&R recommended the dismissal of all claims except those asserted against the EPA Administrator (the "Administrator") under Title VII and the ADEA. See Doc. 26 at 8. Ms. Sawyer did not file any objections to the December 2009 R&R, and the district court adopted it in full as the order and opinion of the court. See Doc. 27 (Order dated January 4, 2010 adopting Non-Final Report and Recommendation) at 1.

On February 4, 2010, Ms. Sawyer filed a Third Amended

Complaint (the "Complaint"), in which she alleged Title VII and ADEA claims against The Administrator. See Doc. 29 (Third Amended Complaint). The parties engaged in discovery, after which the Administrator filed a motion for summary judgment on April 25, 2011. See Doc. 57 (Defendant's Motion for Summary Judgment). The summary judgment motion sought the dismissal of all claims asserted in the complaint on grounds of exhaustion, untimeliness, failure to state a prima facie claim and failure to show pretext. See id.

In her response, Ms. Sawyer indicated that she was dismissing "her claims for age and color discrimination due to a lack of sufficient evidence." See Doc. 62 (Plaintiff's Response to Motion for Summary Judgment) at 1 n.1. She opposed summary judgment as to her claims for race and gender discrimination as well as retaliation under Title VII. See id.

The Magistrate Judge issued a Final Report and Recommendation ("R&R") in which she recommended granting the summary judgment motion. See Doc. 76 (Final Report and Recommendation dated August 22, 2011). With regard to Ms. Sawyer's failure to promote claim, the R&R found that she had not shown that she was qualified for a promotion to the GS-13 grade level or that someone outside her protected class was given the promotion. See Doc. 76 at 40. The R&R further found that Ms.

Sawyer had not demonstrated that the reasons offered by the Administrator for the failure to promote were a pretext for discrimination or retaliation. See id. at 41. With regard to Ms. Sawyer's other retaliation claims, the R&R found that her required participation in the South Carolina Pilot Project was not a materially adverse change in job duties and that the reason she was directed to participate was not a pretext for retaliation. See id. at 46-48. The R&R also found that Ms. Sawyer failed to show a causal link between protected activity and her suspension, and that the reason for her suspension was a pretext for retaliation. See id. at 48-50. With regard to the Ms. Sawyer's constructive discharge claim, the R&R found that Ms. Sawyer had not stated an actionable constructive discharge claim.<sup>1</sup> Ms. Sawyer filed objections to the R&R. See Doc. 77 (Plaintiff's Objections To Magistrate Judge's Report and Recommendation). The district court addressed and dismissed the objections as meritless, and granted the summary judgment motion. See Doc. 78 (Order dated September 22, 2011 adopting Final Report and Recommendation and granting Motion for Summary Judgment). In its order the district court agreed with the R&R's finding that, with regard to her failure to promote claim, Ms. Sawyer had not

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<sup>1</sup>The R&R also addressed additional claims that Ms. Sawyer raised below, but that are not raised on this appeal.

shown that she was qualified for a promotion to a GS-13 level, that someone outside of her protected class was given the promotion or that the reason she was not promoted was a pretext for discrimination. See Doc. 78 at 6-7. The district court also agreed with the R&R that, with regard to her retaliation claims, Ms. Sawyer failed to rebut the Administrator's showing that it had legitimate, non-retaliatory reasons for its actions. See id. at 8. With regard to Ms. Sawyer's constructive discharge claim, the district agreed with the R&R that Ms. Sawyer failed to state an actionable claim and, further, that she did not establish a causal link between any alleged harassment and her decision to retire. See Doc. 78 at 8-9.

Judgment was entered for the Administrator on September 22, 2011 and Ms. Sawyer timely filed her Notice of Appeal on November 18, 2011. See Docs. 79 (Clerk's Judgment), 82 (Notice of Appeal).

## **2. Statement of the Facts**

In January of 2006, appellant Elizabeth Sawyer retired from the EPA. See Doc. 59 (Deposition of Elizabeth E. Sawyer taken on August 26, 2010) at 243. At the time of her retirement, Ms. Sawyer was a Financial Compliance Specialist (GS-12), in the Region 4 Office, Waste Management Division, Resource Conservation and Recovery Act ("RCRA") Branch of the EPA in Atlanta, Georgia.



See Doc. 59 at 28 & Ex. 34 (Email Dated March 18, 2005 from Elizabeth Sawyer To Christine McCulloch). She had held this position since February 1998. See Doc. 59 at 24 & Ex. 1 (Notification of Personnel Action dated January 30, 1996).

As the only Financial Compliance Specialist in Region 4, Ms. Sawyer was responsible, *inter alia*, for visiting the state environmental agencies for the eight states within Region 4 and reviewing the financial assurance instruments that the Treatment, Storage and Disposal ("TSD") facilities in that region were required to keep on file with the state. See Doc. 57-2 (Declaration of Douglas C. McCurry dated April 25, 2011), ¶ 4. Once a TSD facility is issued a permit to treat, store or dispose of hazardous waste, the facility is required to maintain certain documentation, including financial assurance instruments, demonstrating that it has adequate funds to properly remove and dispose of any hazardous waste left on the site in the event that the TSD facility shuts down or goes bankrupt. See Doc. 57-2, ¶ 5. TSD facilities also are required to have a closure plan in place as well as cost estimates of the funds required to remove and dispose of the waste as outlined in the closure plan in the event of a shutdown. See Doc. 59 at 33-35. Although Ms. Sawyer's job duties included reviewing the cost estimates to make sure that they were properly adjusted for inflation, she relied

on the state inspectors (who were engineers) to determine whether the cost estimates were accurate; she did not independently prepare or evaluate cost estimates as part of her job duties. See Doc. 59 at 33-35.

Ms. Sawyer physically reviewed the TSD facilities' financial assurance and related documents at the state agencies rather than at the various TSD facility sites. See Doc. 59 at 124-26; Doc. 62-2 (Plaintiff's Response to Defendant's Statement of Material Facts About Which There Is No Genuine Dispute), ¶ 23. She did not visit the actual TSD facilities or conduct on-site inspections as part of her job duties. See Doc. 59 at 124-29; Doc. 62-2, ¶¶ 23-24. Site inspections (to ensure compliance with the EPA's applicable regulations) were performed by RCRA Enforcement and Compliance Branch field inspectors, who were required to have either an engineering or science degree. See Doc. 57-2, ¶ 10.

During the 2003-2004 time period, the EPA was becoming increasingly concerned about the clean-up problems that arose when a TSD facility declared bankruptcy or closed without the financial resources necessary to clean up the hazardous waste left at the site. See Doc. 57-2, ¶ 12. As a result, EPA headquarter began to focus on the need to give "financial

assurance" more attention. See Doc. 57-2, ¶ 12.<sup>2</sup> In response to the increased focus by the EPA headquarters on financial assurance, the Region 4 RCRA Enforcement and Compliance Branch selected financial assurance as a priority area for their field inspections. See Doc. 57-2, ¶ 13. It began to develop a plan for specialized on-site inspections by its field inspectors, which would focus on financial assurance issues, and it started an initiative to train the field inspectors for these inspections. See Doc. 57-2, ¶ 13.

During these proposed inspections, the field inspectors would be checking on what the TSD facility was allowed to store, what it was, in fact, storing, what its closure plan provided and what the cost estimates indicated for disposing of the waste. See Doc. 57-2., ¶ 13. The field inspectors would not be reviewing the adequacy of the TSD's financial assurance instruments during these specialized inspections, but they would be trained so that they could understand the entire financial assurance process and how the financial assurance instruments would fit in with the issues that they were to examine during the proposed inspections. See McCurry Decl., ¶ 13.

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<sup>2</sup>The EPA headquarters in Washington D.C. establishes national program goals and priorities on an annual basis for the upcoming year. See Doc. 57-2, ¶ 12.

Because Ms. Sawyer had conducted financial assurance reviews in the past, her supervisors wanted and expected her to provide input into and information with regard to the proposed inspections. See Doc. 57-2, ¶ 17. However, the specialized inspections would not supplant Ms. Sawyer's financial assurances inspections at the state agencies. See Doc. 57-2, ¶ 14. Even though the field inspectors were going to be trained in financial assurance, Ms. Sawyer would still have to conduct her financial assurance reviews because the field inspectors would conduct their inspections on site, not at the state agencies. See Doc. 57-2, ¶ 14. No one at the EPA ever told Ms. Sawyer that her job was going to be eliminated or that any of her job duties were going to be taken away from her. See Doc. 59 at 233-35.

In October of 2003, Ms. Sawyer's first-line supervisor was Kenneth Lapierre, the Chief of the Northern Enforcement and Compliance Section. See Doc. 70 (Deposition of Narindar Kumar taken on October 29, 2010), Ex. 1 (organization chart). On October 23, 2003, Mr. LaPierre sent an email to Ms. Sawyer explaining that the branch was beginning the process of targeting compliance inspections at TSD's to support the effort of the EPA national Office of Enforcement and Compliance Assurance ("OECA") to incorporate financial assurance reviews into compliance inspections. See Doc. 59, Ex. 21 (Emails Dated October 30 and

October 31, 2003). Mr. Lapierre asked for Ms Sawyer's help identifying facilities that she thought needed targeting based upon her work with the states, and he asked her to find or develop a checklist or handout to give to the inspectors so they would know what documentation to ask for during the inspections. See id. He also informed her that "the inspectors are going to need help reviewing and evaluating the documentation gathered during the inspections so that they can discuss the findings in the inspection reports." Mr. Lapierre gave Ms. Sawyer the option of organizing a meeting with all of the inspectors to discuss how to handle the reviews or meeting with them individually. See id.

In her reply email dated November 3, 2003, Ms. Sawyer told Mr. Lapierre that she should be the one to do the financial assurance reviews because she was currently doing the job, she had several years of experience performing the reviews, and she possessed the knowledge, skill, ability, and education - qualities that were lacking in the inspectors. See Doc. 59, Ex. 21. She warned Mr. LaPierre that she viewed the process as an unlawful employment practice and a violation of Title VII, "meaning if you decide to pursue this matter, I will file a complaint naming you, and Jewell Grubbs, as the responsible management officials. [Signed] E. Sawyer." See id. Ms. Sawyer never provided the requested information to Mr. LaPierre. See

62-2, ¶ 63. Because Ms. Sawyer did not provide the information that Mr. Lapierre had requested, he gave up and ultimately designed the process without her input. See Doc. 59, Ex. 25 (Email Dated March 11, 2004 from Kenneth Lapierre).<sup>3</sup>

Soon thereafter, Mr. Lapierre was called to serve in Iraq and, eventually, Douglas McCurry assumed Mr. Lapierre's section chief position and became Ms. Sawyer's first-line supervisor. See 57-2, ¶ 2. He reported to Narindar Kumar, the RCRA Branch Chief for Region 4. See 57-2, ¶ 17. Mr. Kumar continued with Region 4's efforts to make financial assurance a priority. At Mr. Kumar's request, Alan Newman, a senior field inspector, scheduled two strategy development workgroup meetings in Atlanta on October 28, 2004 and November 10, 2004 to discuss the proposed specialized field inspections. See 57-2, ¶ 17. Ms. Sawyer was asked to attend these meetings in order to share her knowledge and understanding of the types of financial assurance documents that were on file with the state, and to share her knowledge of past financial assurance reviews and any problems that arose with those past reviews. See 57-2, ¶ 17. However, when Ms. Sawyer was

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<sup>3</sup>Ms. Sawyer does not base any of her claims on Mr. LaPierre's actions; however, she does mention her communications with Mr. LaPierre in the fact section of her Brief of Appellant (the "Brief"). See Brief at 2. Accordingly, the government is responding to her factual characterization of the events.

asked about her prior financial assurance reviews at the October 28, 2004 meeting, she refused to answer questions or provide the requested information. See 57-2, ¶ 18. See also Doc. 59 at 374 & Ex. 2 (EEO Complaint) at 3 (admitting that she "did not provide definitive answers").

During the subsequent November 10, 2004 meeting, Ms. Sawyer again refused to answer questions or provide information. See Doc. 57-2, ¶ 18. Instead, she demanded to know whether the inspectors would be duplicating her work. See Doc. 59 at 145-47. After the group meeting, Mr. Kumar asked to meet with Ms. Sawyer individually in his office. See Doc. 59 at 150. Ms. Sawyer claimed that Mr. Kumar's tone of voice was abusive and that his demeanor was threatening during the meeting, and that he continued to be hostile to her in the private meeting. See Doc. 59 at 145-47, 150. Ultimately, Ms. Sawyer never provided any kind of training or shared any expertise with the field inspectors who would conduct the on-site inspections. See Doc. 59 at 374.

On November 15, 2004, Ms. Sawyer met with an EEO counselor and began the administrative process to lodge an EEO charge of discrimination. See Doc. 59, Ex. 2. On December 21, 2004, Ms. Sawyer filed an EEO complaint alleging discrimination (race, color, sex, national origin and age), non-sexual harassment and

retaliation at the October and November 2004 meetings. See Doc. 59, Ex. 2.

In January 2005, the EPA's national OECA told Mr. Kumar that the office wanted to conduct a financial assurance pilot project in one of the Region 4 states during 2005 as part of its national priority for financial assurance in the RCRA program. See Doc. 57-2, ¶ 19; Doc. 59, Ex. 31 (Email Dated February 24, 2005 from Doug McCurry). Mr. Kumar agreed to participate in the project and selected South Carolina as the Region 4 state for the review. See Doc. 59, Ex. 31. EPA headquarters retained a contractor with specialized experience and expertise in reviewing the corporate financial assurance instruments for the pilot project. See id. The week-long pilot project was scheduled to take place from April 11 through April 15, 2005. See id. Mr. Kumar and Mr. McCurry decided to send Ms. Sawyer and Mr. Newman to South Carolina to participate in the project. See 57-2, ¶¶ 21-23.

On February 24, 2005, Mr. McCurry sent an email to Ms. Sawyer to tell her about the pilot project in South Carolina. See Doc. 59, Ex. 31. He explained why and when it was being done, who would be participating, where the review would take place, and what her role would be. See Doc. 59, Ex. 31. Specifically, Mr. McCurry stated, "I would like for you and Alan Newman, the state coordinator for South Carolina ... to



participate in this review. The purpose of your participation is to assist the contractor in reviewing the files and financial assurance instruments, to share your knowledge and expertise in financial assurance and any specific knowledge you may have of South Carolina facilities that was gained from your past reviews, and lastly to hopefully learn from the contractors and their specialized expertise in financial assurance instruments." See id.

Meanwhile, on February 17, 2005, Mr. McCurry had sent an email to Ms. Sawyer about an earlier conversation they had had in his office concerning Ms. Sawyer's work and responsibilities for reviewing financial assurance instruments in the various state offices. See Doc. 59, Ex. 28 (Email dated February 17, 2005 from Doug McCurry). Mr. McCurry explained that he needed to have a better understanding of the scope and results of the reviews that she had performed in the past. See Doc. 59, Ex. 28. Mr. McCurry reiterated that financial assurance had been selected as a Region 4 priority area (and was in the process of being formally adopted as a national priority for fiscal years 2006 and 2007). See id. Because Mr. Kumar had appointed Mr. McCurry to monitor and oversee the branch's effort, Mr. McCurry asked Ms. Sawyer to provide answers to a list of attached questions designed to help him gain a thorough understanding of the work that Ms. Sawyer had

been performing during her financial assurance reviews in each of the Region 4 states. See id.

Soon thereafter, Ms. Sawyer asked Mr. McCurry about the possibility of having her position upgraded from a GS-12 level to a GS-13 level. See Doc. 57-2, ¶ 37. According to the EPA's Position Description Coversheet, Ms. Sawyer's position was officially classified as a GS-12 level position with "no promotion potential." See Doc. 59, Exs. 14-15. There was no Financial Compliance Specialist position in Region 4 graded at the GS-13 level. See 57-2, ¶ 37. As a result, Mr. McCurry told Ms. Sawyer that she would have to demonstrate to him and to the Human Resources Department that her position required her to perform work at a GS-13 level and request that her position be upgraded to and reclassified at the higher level. See id. Mr. McCurry explained that, in his experience, Ms. Sawyer would need to demonstrate that her position required a high degree of technical expertise in her particular subject matter area. Mr. McCurry also told Ms. Sawyer that her response to the questions and requests for information that he had sent to her on February 17th would help him determine whether she had such expertise in the financial assurance area. See id.; see also Doc. 59, Exs. 28, 37.

On March 10, 2005, Ms. Sawyer sent to Mr. McCurry a brief,

seven-paragraph memorandum in response to his February 17<sup>th</sup> email. See Doc. 59, Ex. 29 (Memorandum dated March 10, 2005 from Elizabeth Sawyer). The memorandum did not respond to all of the inquiries contained in the February 17<sup>th</sup> email. See id. For example, it did not provide the dates of the of the most recent financial reviews, or the dates of the last reviews for each state. See id. It only stated, very generally, that Ms. Sawyer had conducted reviews in three of the states in 2004, and the other states in 2003. See id. at 2. In the Memorandum Ms. Sawyer claimed not to have a tentative schedule for upcoming reviews. See id. Additionally, she did not provide information regarding the types of deficiencies and violations that she had found in her reviews, or how these deficiencies were resolved. See id. at 1-2.

On March 18, 2005, Ms. Sawyer sent an email to Christine McCulloch (the EPA Headquarters official in the OECA tasked with implementing financial assurance as a national priority and the pilot program in South Carolina) stating that she failed to see the need to include Region 4 in the pilot project because Region 4 states were already experienced in financial reviews and regularly performed financial responsibility file reviews and regional overviews. See Doc. 59, Ex. 34. When Mr. McCurry learned about Ms. Sawyer's email to Ms. McCulloch, he told her

that the email was both "out of line" and "inappropriate," and that she was not to correspond directly with EPA Headquarters in the future without copying him on the correspondence. See Doc. 59, Ex. 35 (Email Dated March 21, 2005 from Doug McCurry).

On March 31, 2005, Mr. McCurry met with Ms. Sawyer to discuss the details of the South Carolina pilot project and to give her instructions to make travel arrangements. See Doc. 57-2, ¶ 27. After the meeting, Mr. McCurry sent a follow-up email to Ms. Sawyer summarizing what they had discussed. See Doc. 59, Ex. 36 (Email Dated March 31, 2005 from Doug McCurry). The email included specific instructions to make travel plans for participating in the pilot project in South Carolina the week of April 11-15. Mr. McCurry also told Ms. Sawyer that he considered her participation in the review to be an important part of her current job responsibilities and that her "knowledge of financial assurance instruments in South Carolina from [her] previous reviews will be an important contribution to the 'Pilot Project.'" Mr. McCurry also reminded Ms. Sawyer that he had not yet received all of the information that he had requested in his February 17th email to her. See id..

On April 7, 2005, only two business days before the South Carolina pilot project was scheduled to begin, Mr. McCurry reviewed the branch's travel manager system and noticed that Ms.

Sawyer had not submitted a travel authorization for her travel to South Carolina. See Doc. 57-2, ¶ 28. He immediately sent an email to Ms. Sawyer again instructing her to participate in the pilot project. See id. In response, Ms. Sawyer sent a memorandum to Mr. McCurry in which she stated--for the first time--that she could not (and would not) participate in the pilot project because she believed that it would require her to enter into an improper contractor relationship of a type that was prohibited by the EPA. See Doc. 59, Ex. 39 (Memorandum Dated April 7, 2005 from Elizabeth Sawyer). Ms. Sawyer attached to her memorandum a copy of a 1994 EPA Order, No. 1901.1A, regarding the agency's use of personal services contracts and avoiding improper relationships between contractors and EPA employees performing contract management activities. See id. In her memorandum, Ms. Sawyer told Mr. McCurry that, "I have the right to refuse to participate in what I believe to be a prohibited activity. In the past, the Office of the Inspector General and the General Accounting Office have indicated that agency contracts were not always administered in accordance with applicable laws, regulations, and policies. If you care to pursue this matter, I can refer this matter to the Inspector General and/or General Accounting Office for clarification." Id.

In a reply email, Mr. McCurry notified Ms. Sawyer that his

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instructions regarding her attendance at the pilot project remained the same, that he considered her participation to be an "essential part" of her job responsibilities, and that if she did not participate, he would consider that to be "a serious dereliction of your duties within the Branch." See Doc. 59, Ex. 38. Meanwhile, Mr. McCurry contacted Mr. Kumar and Christine McCulloch via telephone to discuss Ms. Sawyer's concerns about her participation in the project. Ms. McCulloch assured Mr. McCurry that Ms. Sawyer's concerns were unfounded, that the contract in question had gone through all of the EPA's appropriate contracting procedures, and that the Inspector General's Office was aware of the pilot project. See Doc. 57-2, ¶ 30. Mr. McCurry then sent a written memorandum to Ms. McCulloch (with copies to Mr. Kumar and Ms. Sawyer) memorializing their discussion. By copy of the memo, Mr. McCurry again instructed Ms. Sawyer to participate in the pilot project on April 11th. See Doc. 59, Ex. 43.

On April 11, 2005, the first day of the pilot project, Mr. McCurry notified Ms. Sawyer via email that he had discussed her concerns regarding potential conflicts with Ms. McCulloch and Mr. Kumar, and none of them saw any conflict or problems with her participating in the South Carolina pilot project. He assured her that if management had somehow "missed something," then he and

her other managers would bear the full responsibility for that and she would not be held responsible in any way. After discussing the matter again with Mr. Kumar, Mr. McCurry gave Ms. Sawyer final instructions to go home, pack and travel to South Carolina that afternoon. Mr. McCurry's email closed with the following warning: "Failure to follow these instructions and participate in the Pilot Project will be considered 'Insubordination' and 'Dereliction of Duties' by refusing to do the job that you have been given to do and will result in appropriate disciplinary action." See Doc. 59, Ex. 44.<sup>4</sup>

Despite Mr. McCurry's repeated instructions to Ms. Sawyer to participate in the South Carolina pilot project, Ms. Sawyer refused and failed to do so. As a result, Mr. McCurry and Mr. Kumar recommended that Ms. Sawyer receive a disciplinary suspension. See Doc. 57-2, ¶ 32. On June 2, 2005, Ms. Sawyer was issued a notice of proposed suspension for insubordination, specifically, her failure to participate in the pilot project despite being instructed to do so. See Doc. 59, Ex. 50. On August 29, 2005, Ms. Sawyer was notified by J.I. Palmer, Jr., the

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<sup>4</sup>Notably, no one within the EPA or the OIG found that Ms. Sawyer's concerns regarding the South Carolina pilot project were reasonable or supported by the EPA's policies, procedures or regulations. See Doc. 57-2, ¶ 35. See also Doc. 62-2, ¶ 142.

Region 4 Regional Administrator, that the EPA was formally suspending her, without pay, for five calendar days beginning on Monday, September 12, 2005. See Doc. 59, Ex. 53. On September 19, 2005, Ms. Sawyer sought leave to amend her EEO complaint to add a claim based on her suspension. See Doc. 15 (Plaintiff's Response to Defendants' Motion To Dismiss), Ex. 1 (Complainant's Motion To Amend Complaint).

After she returned from her suspension, Ms. Sawyer continued to refuse and ignore the requests of her supervisors. On three separate occasions in October 2005, Ms. Sawyer failed to attend financial assurance meetings and training sessions that Mr. McCurry had specifically instructed her to attend and that related to her job responsibilities for fiscal year 2006. See Doc. 59, Ex. 54. In an email to Ms. Sawyer dated October 17, 2005, Mr. McCurry noted that despite being repeatedly told that she was expected to attend the listed meetings Ms. Sawyer had "flatly refused to say" that she would attend and apparently called in sick on those days. See Doc. 59, Ex. 54. Mr. McCurry directed Ms. Sawyer to obtain a copy of the materials handed out during those meetings and to review the materials independently, but Ms. Sawyer never located or reviewed the handouts. See Doc. 59 at 357-58.

In her interactions with her managers, Ms. Sawyer had



represented to Mr. Kumar and Mr. McCurry that she was keeping track of financial assurance information in a database that she had created. See Doc. 57-2, ¶ 40. In the fall of 2005, Mr. Kumar and Mr. McCurry asked Ms. Sawyer to provide them with a printout of the financial assurance information that she had maintained in her database. Despite repeated requests, Ms. Sawyer failed to provide them with the information and, on October 19, 2005, Ms. Sawyer told Mr. McCurry that "[d]ue to the constant harassment by you and kumar [sic], the database was accidentally deleted. Therefore, there is nothing more to report on this matter." See Doc. 59 at 359 & Ex. 55; Doc.62-2, ¶ 159. When Mr. McCurry asked Ms. Sawyer where the database had been stored (on her desktop PC or the EPA mainframe) and what software program she had used to create the database so that he could have EPA's computer and software experts try to obtain the printouts he and Mr. Kumar had requested, Ms. Sawyer again failed to provide the requested information. See Doc. 59 at 359-60, 365-66; see also Doc. 57-2, ¶ 40.

On November 4, 2005, Mr. McCurry talked to Ms. Sawyer about what he considered to be her persistent refusal to provide the information that he had requested and told her he was considering further discipline against her. See Doc. 57-2, ¶ 40. According to Ms. Sawyer, Mr. McCurry told her he was "planning" another

disciplinary action against her that would be "more severe than the first one." See Doc. 62-2, ¶ 163; Doc. 59, Exs. 55, 57-58.

Mr. McCurry never issued any discipline to Ms. Sawyer after their November 4, 2005 conversation. See Doc. 57-2, ¶ 41. Mr. McCurry never asked Ms. Sawyer to resign or leave the EPA. See id. He never told her that he was planning on terminating her employment. See id. Nevertheless, based on Mr. McCurry's November 4th statement to her, Ms. Sawyer became convinced that Mr. McCurry was planning to terminate her employment. See Doc. 59 at 367. Consequently, in order to avoid the financial losses potentially associated with termination, Ms. Sawyer decided to retire from the EPA. See Doc. 59 at 108, 243-44. According to Ms. Sawyer, the sole reason why she decided to retire from the EPA was because of Mr. McCurry's November 4, 2005 comment. See Doc. 59 at 243-44; Doc. 62-2, ¶ 170.

After Ms. Sawyer retired from the EPA in January 2006, her Full Time Equivalent ("FTE") position was moved to another EPA branch, leaving the RCRA Enforcement and Compliance Branch in Region 4 without a Financial Compliance Specialist position. See Doc. 57-2, ¶ 42. No job announcement was ever posted for Ms. Sawyer's GS-12 position after she retired from the EPA in 2006. See id.

In October 2006, nine months after Ms. Sawyer retired,

Robert Stewart, a GS-13 Hazardous Waste Programs Cost Estimator was transferred from the EPA's Waste Management Division, Superfund Branch, to the RCRA Enforcement and Compliance Branch, at which time he assumed Ms. Sawyer's former duties in addition to his own existing duties. See Doc. 57-2, ¶ 43. Mr. Stewart's job title and grade did not change when he was transferred in October 2006. See id.; see also Doc. 62-2, ¶¶ 177-78.

In Fiscal Year 2006, the financial assurance pilot project was formally expanded into an EPA national enforcement initiative. In lieu of using field inspectors to conduct financial assurance reviews as Region 4 had originally attempted, the EPA decided to use contractors with specialized knowledge and experience in the financial assurance area like it had done in the South Carolina pilot project. See 57-2, ¶ 44.

After she retired from the EPA, Ms. Sawyer received a Final Agency Decision with regard to her EEO claims, and she filed her Complaint in the above-styled action.

### 3. Standard of Review

This Court reviews the district court's dismissal of claims and the grant of summary judgment *de novo*. See Brown v. Snow, 440 F.3d 1259, 1262 (11<sup>th</sup> Cir. 2006). In doing so, this Court will apply the same legal standards as those that controlled the district court. See Real Estate Fin. v. Resolution Trust Corp.,

950 F.2d 1540, 1543 (11th Cir.1992). According to those standards, summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See id. A genuine issue of material fact exists only if sufficient evidence is presented favoring the nonmoving party for a jury to return a verdict for that party. See Farley v. Nationwide Mut. Ins. Co., 197 F.3d 1322, 1336 (11th Cir.1999). In making this assessment, the Court reviews all facts and inferences reasonably drawn from the facts in the light most favorable to the nonmoving party. See id. An exception exists when a party fails to object to a Magistrate Judge's report and recommendation, in which case the factual findings contained in the report are reviewed for plain error. U.S. v. Roberts, 858 F.2d 698, 701 (11<sup>th</sup> Cir. 1988).

The entry of summary judgment is warranted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. See Johnson v. Bd. of Regents, 263 F.3d 1234, 1243 (11th Cir.2001).

This Court may affirm the district court's grant of summary judgment on any legal ground supported by the record, regardless of whether the district court relied on that ground. See Corbitt v. Home Depot U.S.A., Inc., 573 F.3d 1223, 1255 (11th Cir. 2009)

("When reviewing a grant of summary judgment, we may affirm on any legal ground supported by the record, regardless of whether the district court relied on that ground.").

**SUMMARY OF THE ARGUMENT**

Ms. Sawyer's claims in this case arise from her strong opposition to an EPA initiative within Region 4 to begin implementing specialized financial assurance inspections, which she perceived as being an invasion of her own job duties and responsibilities. As part of this initiative, Ms. Sawyer was asked to help familiarize the Region 4 field inspectors with the financial assurance process. She refused to do so. She now claims that her refusal led her supervisors to discriminate and retaliate against her. Her claims are without merit.

Ms. Sawyer's failure to promote claim fails as a matter of law because she did not identify any similarly situated co-workers outside of her protected class who were treated more favorably than she was. She did not identify anyone who requested and obtained an upgrade of his or her existing position from a GS-12 to a GS-13. Although she claims that Robert Stewart, a white male who worked in a completely different branch while Ms. Sawyer was at the EPA and held a GS-13 level position, should be considered a comparator, Mr. Stewart's job duties were different than Ms. Sawyer's and the undisputed facts demonstrate that Ms. Sawyer was not qualified to carry out the duties of her alleged comparator's position. Ms. Sawyer also failed to present evidence to show that the reasons articulated by her supervisor

for denying the promotion were pretext.

Ms. Sawyer argues that she was denied a promotion not only because of race and gender discrimination, but also in retaliation for refusing to train and help familiarize field inspectors with the financial assurance process; however, Ms. Sawyer's refusal to train field inspectors does not constitute protected activity for purposes of a Title VII retaliation claim. Moreover, as discussed above, she cannot show that the reason she was denied a promotion was a pretext for retaliation.

In April of 2005, Ms. Sawyer defied a direct instruction from her supervisor to participate in a financial assurance review that was scheduled to take place in South Carolina (the South Carolina pilot project). As a result, she was suspended without pay for five days. Ms. Sawyer claims that the suspension constituted retaliation because she refused to engage in a prohibited contractor-employee relationship; however, this allegation does not state a claim for retaliation under Title VII. Moreover, the undisputed evidence demonstrates that she was suspended for insubordination, not in retaliation for any kind of protected activity. Accordingly, her suspension claim must fail.

Although Ms. Sawyer appears to argue that her supervisor's requirement that she participate in the South Carolina pilot project constituted retaliation, this claim also fails as a

matter of law. First, there is no evidence in the record to indicate that participation in the pilot project was an arduous or low status job such that it would constitute a "materially adverse" action. Even if Ms. Sawyer could make such a showing, she ultimately did not participate in the project. Finally, there is no evidence in the record that the pilot project was created as a means of retaliating against her; she cannot show that the reasoning behind the project was a pretext for retaliation.

Finally, Ms. Sawyer voluntarily retired in January of 2006 after Mr. McCurry informed her that he was considering disciplinary action against her for her continued insubordination. Although Ms. Sawyer argues that she was constructively discharged, there is no evidence in the record that the conditions of her employment had become so intolerable as to compel a reasonable person to resign. As a result, she cannot establish an actionable constructive discharge claim.

**ARGUMENT AND CITATION OF AUTHORITY**

- I. The District Court Properly Dismissed Ms. Sawyer's Failure To Promote Claim.**
  - A. Ms. Sawyer Failed To Establish A Prima Facie Failure To Promote Claim Because She Failed To Show That She Was Treated Less Favorably Than A**



**Similarly Situated Co-Worker Outside  
Of Her Protected Class Or That She  
Was Qualified For The Promotion.**

The district court properly found that Ms. Sawyer failed to submit evidence to support her failure to promote claim.<sup>5</sup> During the relevant time period (October 2004 through January 2006), Ms. Sawyer never applied for a separate position within the EPA. Her failure to promote claim is based on a request that she made to her supervisor in February of 2005 to upgrade her position from a GS-12 to a GS-13 level. See Doc. 59 at 66; Doc. 57-2, ¶ 37. Ms. Sawyer complains that the Magistrate Judge incorrectly characterized her request as one for an upgrade rather than a promotion; however, the terminology of her request is not material. Regardless of whether she characterizes her request as one for an upgrade or a promotion, she failed to establish a

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<sup>5</sup>Ms. Sawyer failed to administratively exhaust her failure to promote claim. She asked for the promotion in February 2005. See Doc. 59, Ex. 37 (Emails Dated April 2005 referring to discussions in February). Although this occurred after she filed her initial EEO complaint in December of 2004, it occurred before she moved to amend her EEO complaint in September of 2005. See Doc. 15 at 1. Despite this, she failed to include her failure to promote claim in her motion to amend. See id. The Administrator asserted this argument in the court below; however, the district court did not dismiss on this basis. Nonetheless, this Court could affirm on this alternative basis. See Crawford v. Babbitt, 186 F.3d 1322, 1326 (11th Cir.1999); 42 U.S.C. § 2000e-16(c). See also Gay v. AirTran Airways, Inc., 427 Fed.Appx. 743, 745 (11<sup>th</sup> Cir. 2011) (failure to promote claim was barred when it was not included in the EEOC complaint and it was a "discrete act").

prima facie claim of discrimination because she did not show that she was qualified for a GS-13 position and that she was treated less favorably than any similarly-situated co-workers outside of her protected class with regard to that request.

Assuming for sake of argument that Ms. Sawyer sought a promotion, she would be required to show the following in order to establish a prima facie discrimination claim: (1) she belonged to a protected class; (2) she applied for and was qualified for the position in question, (3) she was rejected despite her qualifications; and (4) someone outside of her protected group was given the promotion. See Brown v. Ala. Dep't of Transp., 597 F.3d 1160, 1174 (11th Cir.2010); Walker v. Mortham, 158 F.3d 1177, 1186, 1193 (11<sup>th</sup> Cir. 1998). "The comparators for the fourth prong must be 'similarly situated in all relevant respects.'" See Brown, 597 F.3d at 1174.

Ms. Sawyer failed to identify anyone outside of her protected group whose position was upgraded or reclassified from a GS-12 to a GS-13. Accordingly, she failed to establish a prima facie claim. Ms. Sawyer argues that a white male co-worker, Robert Stewart, received the promotion that she was denied (see Brief at 12); however, there is no evidence in the record to support this contention. At the time Ms. Sawyer asked for her position to be upgraded to a GS-13, Mr. Stewart was working in a

completely different branch of the EPA (the Superfund Branch) as a Hazardous Waste Cost Estimator. See Doc. 62-2, ¶¶ 177-79. This position already was graded at a GS-13 level at that time. See Doc. 62-2, ¶¶ 177-79. See also Brief at 12.

Once Ms. Sawyer retired, no one was hired to replace her. Instead, her position was eliminated and, nine months after she left, Mr. Stewart took on her job responsibilities in addition to his own pre-existing ones. See Doc. 62-2, ¶¶ 177-79. See also Doc. 57-2, ¶ 43. He kept his job title and his grade level, despite taking on these additional job responsibilities. See Doc. 62-2, ¶¶ 177-79. In other words, Mr. Stewart's GS-13 grade level was not based on his assumption of Ms. Sawyer's job duties; it pre-existed those duties and was based on his duties as a cost estimator. See Brief at 12 (acknowledging that Mr. Stewart "was already at a GS-13 level in his previous job [and] he was not at a GS-13 based upon a financial specialist job duties").

Ms. Sawyer goes on to argue that Mr. McCurry subsequently advertised her old position at a GS-14 level, and then promoted Mr. Stewart to that position. See Brief at 12. This is untrue. While Mr. McCurry did advertise for an open Financial Specialist position in 2009, that position was substantially different from the one that Ms. Sawyer had held more than three years earlier. For example, the GS-14 job posting stated that the position

required significant past experience at the GS-13 level developing detailed, comprehensive in-house cost estimates in order to determine the adequacy of the facility-prepared cost estimates. See Doc. 63-1 at 2. The "major duties" listed in the job posting included "independently develop[ing] in-house cost estimates of facilities closure plans, post-closure plans, and corrective actions; and serv[ing] as [a] national expert regarding the preparation and dissemination of cost estimates, cost estimating training and cost estimating guidance to EPA Headquarters, R4, and other EPA regions and offices, and state agencies." See Doc. 63-1 at 3. In contrast, Ms. Sawyer testified that, as a Financial Compliance Specialist, she did not develop cost estimates. See Doc. 59 at 32-33. Rather, she would simply review the cost estimates developed by others to ensure that they had been adjusted for inflation. See Doc. 59 at 33. Other than that, she did not review them for accuracy; instead, she would rely on the state engineer to determine whether the estimate was reasonable and accurate. See id. 33-35, 38-39.

The job posting for the 2009 GS-14 position stated that, "Extramural resources management duties comprise more than 50% of the duties of the position and consist of contracts management and interagency agreements." See Doc. 63-1 at 3. Ms. Sawyer made no mention of extramural resource management duties or

serving as a national expert regarding the preparation and dissemination of cost estimates during her lengthy description of her job duties. See Doc. 59 at 30-51. Therefore, Ms. Sawyer cannot show that Mr. Stewart received the upgrade that she had requested four years earlier, in February of 2005, and was denied.

Moreover, Ms. Sawyer cannot show that she was qualified for the GS-14 position that she claims was the same as her own. In her Brief, Ms. Sawyer argues that she "had over a decade of experience" while Mr. Stewart "had none"; and that she "was an expert" but Mr. Stewart, "was not"; and that she "possessed knowledge and expertise" while Mr. Stewart "lacked knowledge and expertise." See Brief at 13. During her deposition, Ms. Sawyer testified that she did not have the training to develop cost estimates, and that she would rely on the states' engineers to evaluate them for her. See Doc. 59 at 33-35, 38-39. She further admitted that she did not have a degree in engineering. See Doc. 59 at 11-12. However, the GS-14 job posting clearly required the selectee to develop detailed and comprehensive cost estimates and to serve as a national expert with regard to the preparation of such estimates. See Doc. 63-1 at 3. Additionally, Ms. Sawyer was a GS-12 at the time of her retirement. The GS-14 job posting required "significant past experience at the GS-13 level."

See Doc. 63-1 at 2. Even if Ms. Sawyer had remained at the EPA and had applied for the GS-14 position, she would not have been qualified to hold that position.<sup>6</sup>

Accordingly, the district court properly held that the evidence in the record did not support a prima facie failure to promote claim.

**B. Ms. Sawyer Failed To Show That The Reason Her Position Was Not Upgraded To A GS-13 level Or That Mr. McCurry's Basis For Selecting Mr. Stewart, Four Years Later, For A GS-14 Position Was A Pretext For Discrimination.**

Even if Ms. Sawyer had been able to establish a prima facie claim of discrimination, Mr. McCurry provided a legitimate, non-discriminatory reason for his decision not to upgrade her position to a GS-13 level and for selecting Mr. Stewart for the GS-14 position in 2009. See Brown v. Ala. Dept. of Transportation, 597 F.3d 1160, 1174 (11<sup>th</sup> Cir. 2010) (if a plaintiff establishes a prima facie failure to promote claim, the burden of production shifts to the employer to articulate a legitimate, non-discriminatory reason for its actions).

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<sup>6</sup>Ms. Sawyer also argued that she had a Bachelor of Business Administration degree while Mr. Stewart had no degree; however, she did not cite to any record evidence regarding Mr. Stewart's lack of a degree, even assuming this was relevant to their relative qualifications for the GS-14 position. See Brief at 13.

Mr. McCurry testified that Ms. Sawyer's position was not upgraded from a GS-12 to a GS-13 because the level of technical expertise required to carry out her duties did not warrant a higher grade. Doc. 57-2, ¶ 37. Notably, when Ms. Sawyer's position was officially classified at a GS-12 level position, the Human Resource Department stated that there was "no promotion potential." See Doc. 59, Exs. 14, 15. Additionally, at that time there was no Financial Compliance Specialist position graded at the GS-13 level in Region 4 (Ms. Sawyer held the only such position). See Doc. 57-2, ¶ 37.

Accordingly, Mr. McCurry told Ms. Sawyer that she would have to demonstrate to the Human Resources Department that her position required her to perform work at a GS-13 level and request that her position be upgraded to and reclassified at a higher level. See Doc. 57-2, 37. He explained that based on his experience, Ms. Sawyer would have to demonstrate that her position required a high degree of technical expertise in her particular subject matter area. See id. He said that Ms. Sawyer's answers to his earlier February 17, 2005 email, in which he requested information that she was supposed to gather from her prior financial assurance inspections, would help him determine

whether she had such expertise. See id.<sup>7</sup>

On March 10, 2005, Ms. Sawyer sent a short, seven-paragraph memorandum in response to Mr. McCurry February 17, 2005 email, which was very general and not fully responsive to Mr. McCurry's request for information. See Doc. 59, Ex. 29. On March 31, 2005, Mr. McCurry reminded Ms. Sawyer that he had not yet received all of the information that he had requested in his February 17 email. See Doc. 59, Ex. 36. Instead of following up by providing the missing information, Ms. Sawyer sent an email back to him accusing him of "reneg[ing]" on his alleged offer to help her with the upgrade. See Doc. 59, Ex. 37. Mr. McCurry responded by denying that he had ever been ready to prepare a recommendation for Ms. Sawyer's position to be upgraded to a GS-13 and went on to state that her responses to the questions contained in his February 17 memo were not as helpful as they might have been because she had not answered some of his questions at all, while others were only answered in a very short manner. See Doc. 59, Ex. 37.

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<sup>7</sup>Mr. McCurry had sent the email for an unrelated reason: Mr. Kumar, had appointed him to monitor and oversee the branch's effort with regard to financial assurance, and Mr. McCurry's questions were designed to help him gain an understanding of the work that Ms. Sawyer had been performing. See Doc. 59, Ex. 28. Ms. Sawyer's request that Mr. McCurry consider upgrading her position came after he had sent out the email. See Doc. 57-2, ¶ 37.



Although Ms. Sawyer clearly disagrees with Mr. McCurry's (and the Human Resources Department's) assessment of the appropriate grade for her position, she failed to identify any evidence in the record indicating that the assessment was a pretext for discrimination. Accordingly, she failed to demonstrate the existence of a genuine dispute on this issue.

Ms. Sawyer argues that Mr. McCurry's reliance on her response to his February 17 request for information constituted the type of pre-screening test that had been held unlawful by the U.S. Supreme Court in Griggs v. Duke Power Company. See Brief at 12, citing Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). This argument fails.

First, Mr. McCurry did not require Ms. Sawyer to undergo a test in order to decide whether she would be promoted; the evidence shows that he had sent an email request for information to her regarding her prior financial assurance inspections. After she asked him to consider upgrading her position to a GS-13 grade, he told her that he would offer her his opinion regarding whether her position warranted an upgrade based on the answers that she provided to his previous email. See Doc. 57-2, ¶ 37.

Second, Griggs only held that tests could not be used to screen potential candidates for a position where the test had nothing to do with competency to hold the position. See Griggs,

401 U.S. at 431-32, 91 S.Ct. at 853-54. Here, Mr. McCurry considered the comprehensiveness of Ms. Sawyer's response to his information request to determine how complex her job duties were and how much technical expertise they required. His analysis was directly related to the skill level required to carry out her job.

With regard to the decision to select Mr. Stewart for the GS-14 position in 2009, the record evidence shows that Ms. Sawyer had retired from the EPA three years before the job position was even posted: she retired in January of 2006, but the GS-14 job was not posted until 2009. Compare Doc. 59 at 243 with Doc. 63-1. As a result, she was not present when the selection decision for the GS-14 position was made. Moreover, Mr. Stewart was highly qualified for the job, given his experience as a GS-13 Hazardous Waste Cost Estimator. Compare Doc. 57-2, ¶ 43 with Doc. 63-1 at 2-3. Ms. Sawyer failed to point to any evidence in the record indicating that the reason for Mr. Stewart's selection was a pretext for discrimination (or retaliation).

The district court properly dismissed Ms. Sawyer's failure to promote claim.

## **II. The District Court Properly Dismissed Ms. Sawyer's Retaliation Claims.**

In her Brief, Ms. Sawyer has identified three actions that

she contends constituted unlawful retaliation against her:

- The failure to promote her
- Her suspension in September of 2005
- Mr. McCurry's requirement that she participate in the South Carolina Pilot Program

See Brief at 16. As shown below, the record evidence does not support a retaliation claim based on any of these acts.

**A. Ms. Sawyer Cannot Show That She Was Denied A Promotion Because She Engaged In Protected Activity Or That The Reason For The Failure To Promote Was A Pretext For Retaliation.**

Ms. Sawyer contends that the reason she was not promoted was because she would not train the field inspectors. See Brief at 17 ("Sawyer's supervisor engaged in a pattern of retaliation against her when she opposed training the inspectors."). According to Ms. Sawyer, after she opposed the training of the inspectors, "Her supervisors rejected her and retaliated by refusing to promote her." See id.<sup>8</sup> Even assuming this to be

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<sup>8</sup>In the same sentence, Ms. Sawyer argues that she "did not refuse" to train the field inspectors. See Brief at 17. In fact, the undisputed evidence in the record shows that she repeatedly refused to provide the field inspectors with information regarding the financial assurance documents. Initially, her supervisor Ken LaPierre asked her to provide a checklist of the documentation requirements for the field inspectors to take with them when they conducted their on-site inspections at the TSD. See Doc. 59, Ex. 21. She refused to do so, and Mr. LaPierre had to put the list together himself. See Doc. 59, Ex. 25. Later, after Mr. LaPierre was called to serve

true, her refusal to do so does not constitute "statutorily protected conduct" under Title VII; it constitutes insubordination. Accordingly, her allegations undermine her argument that the failure to promote her was caused by her engagement in protected activity.

In order to establish a prima facie retaliation claim, Ms. Sawyer would have to show that: (1) she engaged in statutorily protected activity; (2) she suffered a materially adverse action; and (3) there was some causal relation between the two events. See Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1277 (11<sup>th</sup> Cir. 2008), citing Burlington N. & Santa Fe Ry. Co. V. White, 548 U.S. 53, 59-71 (2006). Ms. Sawyer cannot show any such causal link.

Protected activity can occur in the form of opposition to an

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in Iraq, Mr. Kumar asked Ms. Sawyer to share her knowledge and understanding of the types of financial assurance instruments that were filed with the state agencies, as well as any problems that she had seen during her past reviews, with the field inspectors. See Doc. 57-2, ¶ 17. The purpose was to identify gaps in the reviews and potential problems that would need to be addressed. See Doc. 57-2, ¶ 17. Ms. Sawyer admitted that she refused to provide any definitive answers to those questions. See Doc. 59 at 137 & Ex. 2 at 3. There is no evidence in the record indicating that she even complied with her supervisor's request to provide information to the inspectors. Ms. Sawyer's argument that she "volunteered herself to do the job" does not create such a dispute. See Brief at 17. Moreover, her volunteering was unhelpful since she did not have the engineering background needed to conduct the on-site inspections at the TSD's. See Doc. 59 at 11-12.

unlawful employment practice or participation in an investigation, proceeding or hearing regarding an unlawful employment practice. See Little v. United Technologies, Carrier Transicold Div., 103 F.3d 956, 959 (11th Cir.1997) ("Under Title VII, it is an unlawful employment practice for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." ).

In this case, Ms. Sawyer argues that her opposition to her supervisors' request that she train the field inspectors constituted the protected activity. See Brief at 17. However, such a request does not constitute an unlawful employment practice; as a result, opposing the request does not constitute protected activity. See Little, 103 F.3d at 959-60. Although an employee can also engage in protected activity if she opposes conduct that she "reasonably believes" constitutes an unlawful employment practice, it was not reasonable to believe that a request to assist a co-worker with his or her job duties constituted an unlawful employment practice. See Little, 103 F.3d at 960("A plaintiff must not only show that [she] subjectively (that is, in good faith) believed that [her]

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employer was engaged in unlawful employment practices, but also that [her] belief was objectively reasonable in light of the facts and record presented."). In this case, Ms. Sawyer was asked to provide some background as to the financial assurance documentation requirements so that the field inspectors—who, unlike Ms. Sawyer, conducted on-site inspections at the TSD's—could better evaluate the facilities and determine whether the actual conditions at the facilities were consistent with what was stated in the financial assurance documentation. See Doc. 68-2 at 2. See also Doc. 76 at 8. Her refusal to do so is not statutorily protected activity.<sup>9</sup>

Ms. Sawyer argues that her supervisors "could have gotten someone else to train the inspectors." See Brief at 20. She further argues that the "financial requirements are published in the EPA regulations and the regulations are in the public domain," and the inspectors "need only peruse the regulations to learn the financial requirements." See id. However, this argument misses the point; it was up to Ms. Sawyer's supervisors,

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<sup>9</sup>The Administrator did not address whether the refusal to train the inspectors constituted protected activity in the court below because Ms. Sawyer did not argue that she was subjected to retaliation because of her refusal. The Administrator assumed that she was alleging that her EEO complaint was the protected activity at issue. On appeal, however, Ms. Sawyer is taking the position that it was her refusal to train that constituted the protected activity.

not Ms. Sawyer herself, to determine how they wanted to address and approach the new financial assurance initiative. Moreover, if Ms. Sawyer believed that it was unlawful for her supervisors to ask her to engage in the training, it does not make sense for her to argue that it would be less so if they chose to ask someone else to do it.

Ms. Sawyer did engage in protected activity when she met with an EEO counselor on November 15, 2004 and filed a formal EEO complaint on December 21, 2004, see Doc. 59, Ex. 2; however, she does not claim that the decision not to promote her resulted from the filing of her EEO complaint; she expressly states that it was caused when she opposed the request that she train her co-workers. See Brief at 16, 17. Accordingly, she cannot show a causal link between the failure to promote and engagement in protected activity.

Moreover, as discussed above, Ms. Sawyer cannot show that the reason her position was not upgraded, or the reason why she was not selected for the GS-14 position three years after she retired, constituted a pretext for discrimination or retaliation. See Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1277 (11<sup>th</sup> Cir. 2008) (holding that the plaintiff bears the ultimate burden of proving retaliation by a preponderance of the evidence and that the reason provided by the employer is a pretext for the

prohibited retaliatory conduct). Although she relies on the EEO counselor report as support for the argument that Mr. Kumar and Mr. McCurry would not consider a GS-13 for her because she would not train the inspectors, she has cited to the counselor's report out of context. See Brief at 16. The report was created on December 10, 2004, two months before Ms. Sawyer asked Mr. McCurry to upgrade her position to a GS-13 level. Compare Doc. 68-2 with Doc. 59 at 66 & Ex. 37; Doc. 57-2, ¶ 37. As a result, the counselor could not have been referring to that request. Rather, the counselor's report referred to the relief that Ms. Sawyer was seeking in her EEO complaint. See Doc. 68-2.

Moreover, the EEO counselor's hearsay comments were made in the context of her attempt to find a way to resolve the outstanding EEO complaint. See Doc. 68-2. Accordingly, Ms. Sawyer should not be permitted to rely on those negotiations to support her federal court claims. See Fed. R. Evid.408.<sup>10</sup>

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<sup>10</sup>According to the EEO counselor, Mr. Kumar and Mr. McCurry had indicated that they would not consider promoting Ms. Sawyer to a GS-13 position at that time because of her unwillingness to cooperate with the training of the field inspectors and the Headquarters' initiative; however; they did agree to meet with Ms. Sawyer to discuss a resolution to her complaint. See Doc. 68-2 at 3. Ms. Sawyer responded by stating that she was not interested in pursuing any resolution that would involve her having to train field inspectors. See id. As a result, no resolution was reached with regard to the relief requested in Ms. Sawyer's EEO complaint.



**B. Ms. Sawyer Failed To Establish A Title VII Claim Based On Her Suspension Because There Is No Causal Link Between Her EEO Activity And The Suspension.**

In her Brief, Ms. Sawyer argues that her supervisors suspended her "after she refused to violate an EPA order on interaction with contractors." See Brief at 16. The order at issue is EPA Order No. 1901.1A and it deals with the agency's use of personal services contracts and how to avoid improper relationships between contractors and EPA employees performing contract management activities. See Doc. 59, Ex. 39. On April 7, 2005, only two business days before she was scheduled to participate in a pilot project in South Carolina, Ms. Sawyer sent a memorandum to Mr. McCurry stating that she would not participate in the pilot project because she believed it would require her to enter into an improper contractor relationship in violation of this EPA order. See Doc. 59, Ex. 39. She went on to state that, "I have a right to refuse to participate in what I believe to be prohibited activity."<sup>11</sup> When she failed to

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<sup>11</sup>By way of background, Ms. Sawyer did not raise this concern until a month and a half after she was asked to participate in the pilot project, and only two business days before the pilot project was scheduled to take place. See Doc. 59, Exs. 31, 39. Moreover, she already had gone over her supervisor's head and tried to convince the official at EPA headquarters who was tasked with implementing financial assurance as a national priority and with the pilot project itself that Region 4 did not need to

participate in the pilot project, she was suspended. See Doc. 59, Exs. 50 & 53. Ms. Sawyer now argues that she was suspended in retaliation for refusing to engage in this allegedly prohibited activity. See Brief at 17-19.<sup>12</sup>

In other words, Ms. Sawyer is not arguing that she was suspended because she engaged in conduct protected under Title VII; she is arguing that she was subjected to retaliation under the Whistleblower Protection Act (the "WPA"). However, Ms. Sawyer voluntarily dismissed this claim from her complaint after the Magistrate Judge recommended that the claim be dismissed and the district court adopted the recommendation (without objection). See Doc. 29 at 1. Unlike her Second Amended Complaint, Ms. Sawyer's Third Amended Complaint does not contain a claim under the Whistleblower Protection Act. Compare Doc. 29 with Doc. 6. As a result, the WPA claim is not longer properly before the Court.<sup>13</sup>

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participate in the pilot project (for reasons unrelated to the EPA order). See Doc. 59, Ex. 34. When this effort failed, she resorted to this new excuse for refusing to participate.

<sup>12</sup>Ms. Sawyer did not assert this argument in the district court below; rather, she argued that she was suspended because of her EEO complaint. See Doc. 62 at 14.

<sup>13</sup>Ms. Sawyer's argument that the suspension was caused by something other than protected activity under Title VII undermines her retaliation claim. If the Court accepts her contention as true, then there is no basis for a reasonable jury

Even if Ms. Sawyer had been able to establish a prima facie Title VII retaliation claim based on her suspension, the undisputed evidence shows that the reason she was suspended was because she refused to participate in the South Carolina pilot project, despite repeated directions from her supervisor to do so. See Doc. 59, Exs 50, 53. Ms. Sawyer cannot identify any evidence in the record indicating that this was a pretext for retaliation. Accordingly, the district court's dismissal of Ms. Sawyer's suspension claim should be affirmed.

**C. Ms. Sawyer's Required Participation  
In The South Carolina Pilot Project  
Was Not A "Materially Adverse"  
Action And Was Not Motivated By  
Retaliatory Intent.**

Finally, Ms. Sawyer appears to argue that Mr. McCurry's requirement that she participate in the South Carolina Pilot Program constituted retaliation against her. See Brief at 19 (contending that the pilot project was "just a ruse to get her knowledge and experience").

As a preliminary matter, Ms. Sawyer never challenged her supervisor's request that she participate in the South Carolina Pilot Project during the administrative processing of her EEO claims. Doc. 15, Ex. 1. Accordingly, she failed to exhaust this

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to conclude that she was suspended because of EEO activity.

particular claim. See Crawford v. Babbitt, 186 F.3d at 1326; 42 U.S.C. § 2000e-16(c).

Even if she had exhausted this claim, she could not satisfy the elements of a prima facie retaliation claim because Mr. McCurry's requirement that she participate in the pilot project was not a "materially adverse" action. See Goldsmith, 513 F.3d at 1277, citing Burlington N. & Santa Fe Ry. Co. V. White, 548 U.S. 53, 68, 126 S.Ct. 2405, 2415 (2006). Although a re-assignment of job duties, in some cases, could constitute a materially adverse action, this is true only when the job duties are generally acknowledged to be undesirable or unpleasant. See Burlington, 548 U.S. at 70-71; 126 S.Ct. at 2416-17. As the Burlington Court explained: "Whether a particular reassignment is materially adverse depends upon the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" See id. at 71, 126 S.Ct. at 2417.

In Burlington, the plaintiff had been reassigned from a forklift operator position to a track laborer position. She had produced "considerable evidence that the track laborer duties were 'by all accounts more arduous and dirtier'; that the 'forklift operator position required more qualifications, which is an indication of prestige'; and that 'the forklift operator

position was objectively considered a better job and the male employees resented White for occupying it.'" See id. at 71, 126 S.Ct. at 2417. Based on this, the Burlington Court concluded that a reasonable jury could find that the reassignment could constitute a materially adverse action. See id.

In contrast here, Ms. Sawyer has produced no evidence that participation in the South Carolina Project was more arduous or held less prestige. To the contrary, the pilot project was part of a nationwide EPA initiative that had originated at EPA headquarters. Moreover, Alan Newman, whom Ms. Sawyer claimed was treated better than she because he was a white male,<sup>14</sup> was also asked to participate (unlike Ms. Sawyer, he complied with this request). See Doc. 57-2, ¶ ¶ 22, 23. Finally, unlike the Burlington case, where the plaintiff was actually reassigned from one job duty (forklift operator) to another (track laborer), Ms. Sawyer received no reassignment: Mr. McCurry considered her participation in the pilot project to be "an important part of [her] current job responsibilities." See Doc. 59, Ex. 36.

In the end, Ms. Sawyer never participated in the pilot project. As a result, even if she could somehow show that

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<sup>14</sup>See Doc. 57-4 (Plaintiff's Amended Responses to Defendant's First Discovery Requests to Plaintiff dated October 24, 2010) at 20 (listing Mr. Newman as one of the individuals she felt was treated more favorably than she).

participating in the project would have been a materially adverse action, the fact that she never did so precludes her from satisfying this requirement.

In addition to the fact that Ms. Sawyer failed to establish a prima facie claim of retaliation based on the South Carolina Pilot Project, there is no evidence in the record that Ms. Sawyer was directed to participate in the pilot project for any retaliatory reason. Mr. McCurry asked her to participate in the project because Ms. Sawyer had visited the South Carolina state agency before (as part of her job duties), and was therefore familiar with the location of the financial assurance documents that were on file there, as well as with the setup of the office and the individuals who worked there. See Doc. 57-2, ¶ 21. Mr. McCurry felt that she would be able to help the contractor with regard to the location of various items and the appropriate state employees to contact if an issue arose. See id. Mr. McCurry also felt that because she had reviewed the financial assurance information in the state agency in South Carolina before, her input would be helpful. See id. Ms. Sawyer cannot show that these legitimate reasons for directing her to participate in the pilot project were a pretext for retaliation.

As for the reason for the pilot project itself, Ms. Sawyer's allegation that it was a "ruse" to elicit information from her is

unfounded and contrary to the record evidence. See Brief at 19. The undisputed facts in the record below show that the pilot project was part of a national project that was initiated by EPA headquarters, not by Mr. McCurry or Mr. Kumar. See Doc. 59, Ex. 34. The contractor that was assigned to work on the South Carolina pilot project was actually retained by EPA headquarters. See Doc. 57-2, ¶ 20. There is no evidence that either Mr. Kumar or Mr. McCurry created the pilot project as part of a long-term conspiracy to get rid of Ms. Sawyer. Accordingly, the district court properly dismissed this claim.

**III. The District Court Properly Held That Ms. Sawyer's Allegations Failed To State An Actionable Constructive Discharge Claim.**

In order to establish a prima facie claim of constructive discharge, the plaintiff must show that the defendant imposed working conditions so intolerable that a reasonable person in her position would have been compelled to resign. See Fitz v. Puqmire Lincoln-Mercury, Inc., 348 F.3d 974, 977 (11<sup>th</sup> Cir. 2003). The facts alleged by Ms. Sawyer, even if assumed to be true, cannot satisfy this standard.

During her deposition, Ms. Sawyer testified that the reason she retired was because Mr. McCurry had told her, in November of 2004, that he was planning another, more severe disciplinary action against her. See Doc. 59 at 243-44. However, she

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admitted that Mr. McCurry never said that he planned to fire her. See Doc. 59 at 236, 369-70. An employee's fear of the possibility that she would be fired is not enough to support a constructive discharge claim. Roswell v. BellSouth Corp, 433 F.3d 794, 806 (11<sup>th</sup> Cir. 2005) ("In order to show constructive discharge, however, the plaintiff must show that the situation was so 'intolerable' that he had 'no choice' but to take early retirement. The fact that one of the possible outcomes is that he would lose his job alone is not sufficient to establish the intolerable conditions sufficient to justify a finding of constructive discharge because the possibility that a plaintiff may not remain employed is not by itself enough to place a reasonable person in the position of 'quit or be fired.'").

Here, the record evidence contains no support for Ms. Sawyer's contention that if she had stayed, she would have been fired. Ms. Sawyer cites to Mr. McCurry's comment coupled with the language of her September 2005 suspension letter; however, the suspension letter simply indicated that removal was one of the possible disciplinary actions that could be imposed if she engaged in future misconduct, not that removal was the only possible discipline she would face:

[A]ny further instances of similar behavior can be cause for more severe disciplinary action, including removal from federal service.



See Doc. 59, Ex. 53 (emphasis added). This language does not preclude the possibility of more severe disciplinary action short of removal (e.g., a longer suspension). See id. As noted above, the mere possibility that a plaintiff may be fired is not, by itself, enough to place a reasonable person in the position of "quit or be fired." See Roswell, 433 F.3d at 806. This Court has cautioned that "[p]art of an employee's obligation to be reasonable is an obligation not to assume the worse, and not to jump to conclusions too fast." Garner v. Wal-Mart Stores, Inc., 807 F.2d 1536, 1539 (11<sup>th</sup> Cir. 1987).

Ms. Sawyer now argues, for the first time on appeal, that her decision to retire from the EPA also was based on the following:

- The requirement that she participate in the South Carolina Pilot Project
- The temporary removal of her computer
- The denial of her request for travel authorization
- Mr. Kumar's comment that he would fire her if he could

See Brief at 21-25. Ms. Sawyer may not raise an argument for the first time on appeal. See Access Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1331 (11th Cir.2004). Moreover, Ms. Sawyer testified during her deposition that the only reason she decided to retire from the EPA at the end of 2005 was because she was worried that she would lose her benefits if Mr. McCurry terminated her:

Q: And why did you retire?

A: Because Doug McCurry came to my desk and told me that he was planning another disciplinary action, and it would be more severe than the first one.

. . .

Q: Was there any other reason why you decided to retire?

A: Only because of that --

Q: Comment by Mr. McCurry?

A Yes.

See Doc. 59 at 243-44. Accordingly, Ms. Sawyer's own unequivocal testimony demonstrates that there was no causal link between these additional factors and her decision to retire.

Even if the Court were to consider these additional factors, they do not rise to the level of creating an environment so intolerable as to compel a reasonable person to resign. As discussed above, the requirement that Ms. Sawyer participate in the South Carolina pilot project was not part of an ongoing conspiracy to harass her, but rather a reasonable request on the part of her supervisor. Moreover, since she did not ultimately participate in the project, it could not have constituted the type of "intolerable" condition required to establish an actionable constructive discharge claim.

Although Mr. McCurry did briefly take away Ms. Sawyer's

computer, he was trying to retrieve information that Ms. Sawyer was supposed to track and that Mr. McCurry had requested. After Ms. Sawyer claimed that the information had been "accidentally deleted" from the computer, Mr. McCurry borrowed the computer to see if the deleted information could be retrieved. See Doc. 57-2, ¶ 40; Doc. 59 at 366. Even if he had not been justified in removing the computer, doing so would not have created working conditions so intolerable as to compel a reasonable employee to resign.

Also, while Mr. McCurry did deny Ms. Sawyer's request for travel authorization in 2005, he did so because she had not demonstrated to him that her prior travels to the various state agencies had resulted in the collection of the necessary financial assurance information. See Doc. 59, Ex. 52. Moreover, the denial of a single request for travel authorization does not create conditions so intolerable as to compel a reasonable employee to resign.

Finally, Mr. Kumar's comment to Ms. Sawyer was not a threat, but a sign of exasperation after having to deal with a challenging employee. As Mr. Kumar explained:

Ms. Sawyer ha[d] created an uncomfortable situation for employees who need to have contact with her by her resistance to developing a better financial assurance inspection. . . .I wanted her cooperation in developing a strategy to improve the review of the financial

assurance information. What I got from her was a lack of cooperation and a resistance to the process. She displayed anger when we asked for her assistance and when her behavior was confronted, she said what are you going to do fire me[?] I told her that I probably couldn't fire her, but that if I could if [sic] I would because of her lack of cooperation and obstruction to the initiative the branch is working on.

See Doc. 68-4 at 2. After making this comment, Mr. Kumar never threatened to fire Ms. Sawyer or took steps to have her fired.

See Doc. 59 at 236.

In short, there is no evidence in the record that Ms. Sawyer was subjected to intolerable conditions while she was at the EPA. Accordingly, the district court's dismissal of her constructive discharge claim should be affirmed.

#### CONCLUSION

For the above and foregoing reasons, the appellee respectfully requests that this Court affirm the order and judgment of the district court.

Respectfully submitted,

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/s/ Neeli Ben-David  
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**CERTIFICATE OF COMPLIANCE**

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 13,018 words.

This 31<sup>st</sup> day of January, 2012.

/s/ Neeli Ben-David  
NEELI BEN-DAVID  
ASSISTANT UNITED STATES ATTORNEY

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served upon the person listed below a copy of the foregoing document by depositing in the United States Mail a copy of same in an envelope with correct postage for delivery. This is also to certify that the foregoing document was this day uploaded to the Court's website.

Elizabeth E. Sawyer  
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Decatur, Georgia 30034

This 31<sup>st</sup> day of January, 2012.

/s/ Neeli Ben-David  
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